Eminent Domain and the Potential for Land Reform in Appalachia

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I. Introduction

Since the United States' founding, government bodies from the federal to the municipal level have used eminent domain to take property from private owners[1]. Legislatures have justified their use of eminent domain as an enactment of their police power "to regulate actions and property in order to protect the public health, safety, morals, and general welfare" [2]. Overtime, courts have shifted their interpretation of "public use" in the Fifth Amendment from meaning: "use by the public" to meaning: "public purpose." Based on this redefinition, many courts have upheld municipalities' use of eminent domain to take property from one private actor and transfer it to another private actor. Observers have critiqued such public-private takings (condemnations that result in private ownership of the taken property) for privileging private benefit over the general welfare[3]. The case of *Poletown*, among others, calls into question whether a legislated public-private taking will necessarily serve a public purpose[4]. In an effort to prevent misguided use of eminent domain, many legislatures have attempted to categorically ban public-private takings[5]. However, these restrictions may prevent legislatures from effectively enacting their police power. To discourage legislatures from placing severe restraints on the use of eminent domain, the courts should apply a heightened level of scrutiny to takings deemed "suspect," based on a reclassification of private property.

In the following analysis, I will begin with an overview of the development of the public use doctrine. My historical synopsis focuses on the intentions of

condemnations, from those permitted by the Mill Acts (1667) to *Kelo v. City of New London* (2005), and reveals the courts' interpretational shift from "use by the public" to "public purpose." Then, reflecting back on some of the landmark cases, I explore the differing roles of the state and levels of judiciary deference to legislatures. After my outline of the historical development of the public use doctrine and some of the key issues related to it, I consider the critiques of *Kelo* and outline proposals for regulating public-private takings without banning them. The land oligopoly in Appalachia provides one example of a situation in which a public-private taking could achieve a public purpose: distributed land ownership. This example substantiates my stance against a categorical ban on public-private takings.

II. Development of Public Use Doctrine

a. Intent of Condemnation: From Public Use to Public Purpose

Though the Fifth Amendment to the Constitution formally granted the federal government the power of eminent domain, the history of its application in the United States pre-dates the Constitution. In 1625, Grotius offered an early theoretical writing on the power of a State to take private property "for ends of public utility"[6]. Initially, the colonies used eminent domain to construct highways and canals, intended for free use by the public[7]. However, with the first Mill Act in 1667, legislatures approved of the use of eminent domain to acquire property that would be used singularly by a private actor. The Mill Acts allowed grain mill proprietors to appeal to the courts to use eminent domain to take upstream properties that would be flooded by the mill's dam, and transfer them to the mill owner[8]. The legislatures justified this use of eminent domain based on the public

value of a grain mill[9].

State courts diverged in their rulings on whether the Mill Acts should be permitted. For example in *Tyler v. Beecher* and in *Loughbridge v. Harris*, the Vermont and Georgia courts held their states' Mill Acts unconstitutional since they involved the "taking of private property for private purposes"[10]. However, most state courts, such as in Massachusetts, Connecticut, New Hampshire, Maine, Iowa, Kansas, Minnesota, and Wisconsin, upheld eminent domain under the Mill Acts for grain mills and even extended their application to industrial plants. The courts that upheld the Mill Acts ruled that the private benefit to the mill owner was merely "incidental" to the public benefit that the mill provided[11]. The Tennessee state court fell in between these two opinions, holding rather that the Mill Acts were valid as applied to grain mills but not as applied to manufacturing plants, since those did not qualify as a "public use"[12]. The Michigan Supreme Court similarly invalidated its Mill Act as applied to general manufacturing, because "there was no guarantee that the public would receive any direct benefits from such activity"[13].

The state and federal courts have since debated the constitutionality of public-private takings, such as those endorsed by the Mill Acts. I will first outline the state courts' adoption of the broad interpretation of public use as public purpose. Then, I will outline the judicial debate that continues to the present about what constitutes a legitimate public purpose, to be achieved using eminent domain. The expanding applications of eminent domain, exemplified by the judicial trend leading up to and including *Kelo*, led many states to pass statutes limiting or banning

public-private takings. The development of the public use doctrine since the rulings on the Mill Acts sets the stage for the contemporary debate about the value of public-private takings, for example, in Appalachia.

As of 1800, most courts were using a narrow interpretation of public use to mean: "use by the public" based on the precise language in the Fifth Amendment, extended to the states in the Fourteenth[14]. In 1843, the New York Supreme Court applied this narrow interpretation in *Taylor v. Porter*; in this case the court struck down a colonial provision allowing property owners to build private roads across a neighboring property[15].

In 1847, the same court approved of the use of eminent domain to acquire land for railroads in *Bloodgood v. The Mohawk and Hudson Rail Company*. The court justified this decision using the narrow definition of public use, based on the fact that the railroads would be ridden on, and therefore used by, the public[16]. This ruling departed from recent common law precedent by approving the transfer of property from one private actor to another. New York Senator John Tracy criticized that this application of eminent domain was "transferring the title from the owner to his more enterprising neighbor"[17]. Though some courts in the late nineteenth and early twentieth centuries broadened their interpretation of public use to include transfers to private actors, others, for example in Pennsylvania, New Jersey, and Indiana, maintained the narrow interpretation, overruling takings for use by a private actor, and labeling them "excess condemnations"[18].

Nonetheless, a trend continued toward the broad interpretation of "public use" as "public purpose" rather than "use by the public." By 1948, twenty-two state

supreme courts had based holdings on the broad interpretation[19]. Many of these cases were based the use of eminent domain by municipal governments for urban renewal projects. Local planning departments often justified these condemnations based on their removal of "blight" and subsequent protection of the community from harm[20]. The 1936 *New York City Housing Authority v. Muller* case provides an example of this application of eminent domain for urban renewal. In this case, the plaintiff challenged slum clearance by the New York City government for the construction of public housing. The New York Court of Appeals upheld the condemnation in light of slum's effect on "juvenile delinquency, crime, and disease"[21]. The court interpreted the purpose of the project: "to protect and safeguard the entire public from the menace of the slums"[22]. Here, the legislature presented the redevelopment plan as serving the public purpose of eliminating a social harm.

The 1954 Supreme Court ruling in *Berman v. Parker* offered a unanimous endorsement of the broad interpretation of public use: to pursue the public purpose of eliminating a social harm[23]. The Supreme Court sustained the constitutionality of Washington D.C.'s 1945 Redevelopment Act, which involved condemning and clearing a "blighted" urban area and reselling it to private developers. Berman owned a department store in the area to be cleared. He filed a lawsuit that the plan was unconstitutional as applied to his property, based on the fact that the property, after condemned, would be put to a private rather than a public use[24]. However, the Supreme Court interpreted "public use" as "public purpose," which here consisted of the elimination of conditions deemed "injurious to the public health, safety, morals,

and welfare"[25]. Even though Berman's department store was not blighted, the court held that the planning department should be able to approach redevelopment comprehensively instead of on a "'structure-by-structure basis'"[26] [27]. Though the D.C. legislature pursued a similar purpose of blight elimination to the New York Housing Authority, *Berman* diverged from *Muller* in one key characteristic. In *Berman,* the D.C. Redevelopment Authority transferred ownership of the condemned property to a private developer, rather than constructing government-owned public housing on the site[28]. Thus, *Berman* served as the Supreme Court's endorsement of public-private takings.

Not all state courts followed the Supreme Court's precedent in *Berman*, allowing legislatures to use eminent domain to achieve a public purpose in the absence of use by the public. For example, in 1978 in *Karesh v. City Council of Charleston*, the South Carolina Supreme Court enjoined the Charleston municipality's plan to develop a convention center. The project would have involved the condemnation of private property to be leased to private businesses. The court ruled it unconstitutional on the basis that it was serving a private, rather than a public, purpose[29].

However, the overall trend in state courts continued to uphold the broad interpretation of public use. Residents challenged one example of condemnation for economic development in *Poletown Neighborhood Council v. City of Detroit*. The Michigan Supreme Court decided this case in 1981, which involved the use of eminent domain to take private property for use by General Motors. The City of Detroit chose the Poletown neighborhood as the site for General Motors' new

manufacturing facility, without regard to the physical conditions of Poletown; in fact, the neighborhood was well maintained. The rationale for this condemnation was based solely on economic development and job creation[30]. The writer Julia Mahoney has defined takings for economic development, such as this one, as: "property transfers from one private entity to another that are intended to increase tax revenue or employment or to promote economic growth rather than to eliminate some existing harm"[31]. The Detroit municipal government justified this economic development taking with the jobs to be created by the General Motors plant[32]. The dissent in *Poletown* argued, "instead of private benefit being incidental to a public benefit, the public benefit was incidental to the private"[33]. The condemnation displaced 3,500 residents, primarily low-income blacks and immigrants[34]. Because of this vast displacement along racial lines, *Poletown* attracted critique of public-private takings.

Only a few years later in 1984, the Supreme Court decided a second landmark public use case, which again invoked the broad interpretation of public use. In *Hawai'i Housing Authority v. Midkiff,* the Supreme Court upheld Hawaii's 1967 Land Reform Act, which used eminent domain to redistribute land. At the time the Act was passed, because of the islands' recent history of feudalism, eighteen private landowners held forty percent of the land in Hawaii, each owning tracts of more than 21,000 acres. Many people were living and farming on these tracts as tenants, leasing land from the owner. The Land Reform Act mandated the subdivision and transfer of the large tracts to over 5,000 leaseholders [35]. The Hawaiian Legislature listed four public purposes of the condemnation, including to

"increase the availability of land for private homes, spread ownership to as many people as possible, dispense with the monopolistic land practices on the island, and to stabilize land prices"[36]. The Supreme Court did not debate the public purpose served by land reform, but deferred to the Hawaiian legislature's decision that this Act served a public purpose[37].

Even after the Supreme Court's *Midkiff* ruling, state courts consistently applied the broad definition of public use, while continuing to debate what uses served a public purpose. In 1999 in *Casino Reinvestment Development Authority v. Banin*, the New Jersey Supreme Court struck down a proposal to use eminent domain to condemn property for green space and additional parking for the Trump Plaza casino[38]. The next year, in *City of Springfield v. Dreison Investments, Inc.* the Massachusetts Supreme Court rejected another proposed use of eminent domain to transfer ownership from one private owner to the Springfield Baseball Corporation, because the Court did not see a sufficient public purpose[39].

In 2002, the Supreme Court of Illinois, in *Southwestern Illinois Development Authority (SWIDA) v. National City Environmental*, rejected a proposal to take property from a private metal recycling plant in order to expand the parking facilities of a neighboring racetrack. The court rejected the casino owner's argument that the taking satisfied the "use by the public" condition, since use of the property would only be allowed with the owner's permission[40]. In clarifying the constraints of the narrow interpretation of "public use," the court quoted from the opinion in *Gaylord v. Sanitary District of Chicago*: "The public must be to some extent entitled to

use or enjoy the property, not as a mere favor or by permission of the owner, but by right"[41]. After establishing that there would not be use by the public, the court established that the condemnation did not have a valid public purpose, stating, "…absent a showing of blight, a promise of economic development alone will not justify a taking"[42]. Justice Freeman, dissenting, argued that economic development should be considered a legitimate public purpose in its own right[43].

State courts continued to debate the question of whether economic development alone constitutes a legitimate public purpose. In 2004, the Michigan Supreme Court ruled against a redevelopment case resembling *Poletown.* In *Wayne County v. Hathcock*, the court disallowed a redevelopment taking, ruling that a legislature could only use eminent domain if the original properties were blighted, and if the need for redevelopment was of "public necessity of extreme sort" [44]. Thus, the *Hathcock* court required that eminent domain only be used to take property based on its negative qualities rather than on potential future public purpose.

In 2005 Michigan Court of Appeals followed the precedent of *Hathcock* in *City of Novi v. Robert Adell Children's Funded Trust*. Here, the court enjoined a plan to use eminent domain for the construction of an access road to the private headquarters of Wisne Corporation and General Filters. The court did not consider the aim of the project- to "ease the commute into the corporate properties"- a public purpose[45].

In 2005, the Supreme Court again joined the debate about what uses serve a legitimate public purpose. In *Kelo v. City of New London*, the Supreme Court upheld a Connecticut redevelopment plan, ruling that economic development is a sufficient public purpose to justify a taking. Unlike the consensus of *Berman,* however, the

Kelo decision was split 5-4 and the majority issued a cautious opinion. The plaintiff Kelo owned a home in an area to be condemned for the City of New London's riverfront revitalization project. She argued that because her neighborhood was not blighted, the condemnation would not serve a public purpose.

The majority upheld the city's redevelopment plan, asserting that it "unquestionably serves a public purpose," given that "promoting economic development is a traditional and long accepted function of government"[46]. Despite the court's confidence that the condemnation served a public purpose, the majority opinion did caution against the use of eminent domain for private purposes. The majority rested its finding of public purpose on the existence of New London's comprehensive plan, warning that the forced transfer of property from one private actor to another outside a comprehensive plan should "certainly raise a suspicion that a private purpose was afoot"[47].

The dissent in *Kelo* argued: "takings do not satisfy the public use test unless they respond to harm caused by the property being taken"[48]. Justice Thomas, dissenting, expressed a concern that condemnation for economic development will tend to target those with the fewest resources, observing: "Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful"[49]. O'Connor adopted the stance of the courts in *SWIDA* and *Hathcock*, claiming the only legitimate public purpose of condemnation is the elimination of social harm[50]. The majority opinion in *Kelo* responded to this claim, by stating, there is "no principled way of distinguishing economic development from the other public purposes that we have recognized"[51].

Others have affirmed this view, arguing that economic development can be framed as prevention of the social harm of economic stagnation[52].

The cases leading up to and including *Kelo* provide insight into the development of the public use doctrine. After rejecting the narrow interpretation of public use as "use by the public," the courts considered whether blight, land reform, and economic development should qualify as a public purpose. Alongside this debate of public purpose, the courts grappled with two other major questions regarding the application of eminent domain: What role should the state play in the transfer? And, to what extent should the courts defer to the legislatures in the assessment of public purpose?

b. Role of State: Owner, Intermediary, or Facilitator

In the earliest and most consistent applications of eminent domain, the state took ownership of the property and managed it for use by the public. Some courts before *Berman* limited applications of eminent domain to cases of public ownership, excluding even condemnation for private railroads[53]. In *Berman*, the Supreme Court argued that public ownership is not always necessary in order to secure a public purpose[54]. The Supreme Court reaffirmed this position in *Kelo*, stating, "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects"[55].

In condemnations involving the transfer of private property into private ownership rather than public ownership, the state has had various levels of involvement. In some cases, such as *Berman*, the court condemned the property,

took ownership, and then resold it to the highest bidding private developer, allowing the free market to determine to determine the future owner[56].

However, in other cases, the state does not take ownership, instead forcing the transfer of property from one private owner to a pre-determined new owner. This was the case in *Midkiff* [57]. Some legislatures have even delegated the power of eminent domain to private actors, such as railroad companies, allowing them to take and compensate for private property without direct state involvement[58].

c. Deference to Legislature

In considering public use cases, the courts have applied varying levels of judicial scrutiny. Overall, the trend has been toward deference to the legislature's determination of public purpose, and minimal scrutiny. In *Berman*, the Supreme Court articulated an expectation that courts should "defer to the legislature in determining what is a public purpose"[59]. The Supreme Court expanded upon the rationale behind this deference in *Midkiff*, stating "[I]n our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. … Thus, … courts must defer to [the legislature's] determination that the taking will serve a public use"[60]. The Supreme Court thus applied minimal scrutiny in *Midkiff* [61].

As demonstrated above, many state courts have not deferred to legislatures when considering the constitutionality of eminent domain[62]. Some have rejected legislative enactments of eminent domain as unconstitutional, such as in *Banin*, *Hathcock,* and *City of Novi.* Overall, observers have critiqued the courts for using minimal scrutiny. David Shultz, Hamline University legal scholar, for example,

asserted, "In this century the Supreme Court has never held a use to be private when a local court had already declared it to be public"[63]. In *Kelo* the Supreme Court upheld the condemnation based on deference to the City of New London legislature in determining best means of achieving public good[64]. In Kennedy's opinion in *Kelo*, he applies a minimal level of scrutiny, requiring that the legislature determine a rational relationship between the condemnation and a public purpose[65].

II. Reaction to *Kelo*

a. Critiques of economic development takings

After *Kelo*, many civil society groups mobilized to oppose takings that would lead to private ownership (public-private takings), specifically economic development takings. The decision in *Kelo* had an 80-90% public disproval rate, according to polls[66]. The Institute for Justice, which argued on behalf of Kelo, publicized its stance against economic development takings, framing them as a threat to property right security[67]. Others echoed Justice Thomas' concern that "Eminent domain power can be used to favor groups already politically advantaged at the exclusion of other important interests"[68]. Ilya Somin, George Mason University legal scholar, foresaw the possibility that the "economic development" rationale for condemnation could justify a forced transfer of property to any private business, based on its contribution to economic growth"[69]. Somin expressed concern that a local government would be inclined to approve any condemnations that would transfer ownership to a use that would generate higher taxes[70].

Beyond a potential lack of public purpose, critics worried that public-private takings would be used "… not to promote economic or political equality or the public

good but instead to promote other goals or private interests destructive of either the public good or of other private property interests"[71]. Somin presents the outcome of *Poletown* as evidence of the potential for eminent domain to be used counter to the public interest. Somin reveals that the cost of the condemnation and clearance of the property totaled to $250 million, and estimates that the jobs provided by the General Motors factory may have equaled the jobs eliminated by the condemnation of small businesses in the neighborhood. The apparent fruitlessness of the taking, combined with its displacement of 4,200 residents, convince Somin that this economic development taking was not only unproductive, but actively harmful[72].

b. State Legislative Action to limit eminent domain

Based on these critiques, after *Kelo*, over forty states changed their laws to restrict the use of eminent domain[73]. Many states sought to prohibit public-private and economic development takings, in which the public purpose was merely incidental to the private benefits[74]. Justice Stevens implicitly encouraged states to take such legislative action, stating, "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power"[75]. It is possible that the statutes enacted since *Kelo*, as attempts to ban public-private and economic development takings, will prevent municipalities from effectively applying their police power.

IV. Solutions

a. Property Classes

To allow for public-private takings that would "protect the public health, safety, morals, and general welfare," many scholars have suggested differentiating property into classes that would be given different levels of protection. Shultz argues for such a reclassification, stating, "Because not all property is alike, existing property relations or rights should not be treated alike or given like legal protections in society"[76]. For example, some writers distinguished home ownership as a distinct class of property[77]. Ilya Somin recognizes the damage caused by clearing a neighborhood: "While 'fair market value' may compensate homeowners and businesses for part of the financial losses they incur, it does not compensate them for the destruction of community ties, disruption of plans, and psychological harm they suffer"[78]. Based on this, others have suggested the delineation of a "collective right to keep a community of people…intact"[79]. Overall, these legal analysts have attempted to distinguish property that enhances political liberty, personal autonomy, and community cohesion from property that lacks these characteristics.

b. Higher Scrutiny

Some writers have gone on to argue that courts should review takings of property that enhances political liberty, personal autonomy, and community cohesion with a heightened or intermediate level of scrutiny. Shultz offers a similar but more detailed proposal, advocating for heightened scrutiny of decisions affecting property that enhances political liberty, personal autonomy, and community cohesion. Shultz proposes that courts treat these rights as

fundamental[80]. Shultz aspires for eminent domain policies that would "permit the redistributive policies of *Midkiff* and minimize the corporate Darwinism and abuse of minority and individual property and property-like interests sanctioned by *Poletown*"[81].

Jeffrey Scott, legal scholar, offers another method for identifying "suspect takings," based instead on the nature of the parties involved in the condemnation[82]. Scott considers a condemnation "suspect" if "the beneficiary of the condemnation is to be a single corporation… that entity is likely to be both powerful and very interested in the outcome of the process," especially if that entity proposed the condemnation[83]. Scott lists *SWIDA, Poletown,* and *Banin* as exemplifying this power dynamic. He also identifies public-private takings that are expedited or "not a part of prior existing planning documents" as suspect[84]. The value of reviewing takings with intermediate scrutiny, based on the property's role in enhancing political liberty, personal autonomy, and community cohesion, is particularly apparent when applied to Appalachia. By categorically banning public-private takings, Appalachian states are giving up an opportunity to reclaim property for residents from corporations, a redistribution which would enhance political liberty, personal autonomy, and community cohesion. The potential value of land reform in Appalachia demonstrates that state governments can apply eminent domain for successful enactment of their police power.

V. The Importance of Land Reform

a. Precedents

Though the courts saw *Midkiff* as a special case regarding Hawaii's need for

land reform, the court's opinion verified the importance of wealth redistribution for democratic governance[85]. After the Revolutionary War, municipalities in the United States confiscated and distributed large Tory and Loyalist landholdings; one confiscated estate in upstate New York ultimately provided homes to 10,000 farmers[86]. Many of the nation's founders, including Thomas Jefferson, believed that government existed not to protect property but to rather equal access to property[87]. Recalling the Jefferson's rationale, the Supreme Court upheld the constitutionality of land reform in *Midkiff*. The court recognized the "perceived social and economic evils of a land oligopoly" and stated, "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers"[88]. Gia Cincone, legal scholar, claims that the question of landholding has become largely symbolic. However, the "evils of land oligopoly" continue to eclipse political liberty, personal autonomy, and community cohesion in parts of the United States[89].

b. Concentrated Land Ownership in Appalachia

Appalachia exhibits concentrated land ownership comparable to Hawaii in 1967. In six counties in southern West Virginia, the top ten land owners own over half of the land, and such concentrated ownership patterns are common throughout Appalachia[90]. Most of these large landholders are corporations, often based outside of the region[91]. These absentee ownership patterns allow far-removed corporations, rather than residents, to make decisions about how to use the land. West Virginian residents know the "evils of land oligopoly" and could benefit from land reform by eminent domain.

After *Kelo*, along with the majority of state legislatures, the West Virginia legislature passed a law limiting the use of eminent domain for economic development, stating, "…in no event may public use… be construed to mean the exercise of eminent domain primarily for private economic development"[92]. The statute prohibits the taking of private property for transfer to another private owner, unless the property falls within an area designated as "blighted" [93]. This attempt at a categorical ban on economic development takings might prevent the use of eminent domain for the public purpose of land reform.

VI. Conclusion

The interpretation of the public use doctrine by the legislatures and courts has not followed a unidirectional trajectory. Since the Mill Acts, the application of eminent domain has been contended in the courts. Courts have variously approved and disallowed the use of eminent domain to achieve a public purpose in the absence of "use by the public." Overall, the trend has been toward the state acting as facilitator rather than owner or intermediary. Courts have tended increasingly to defer to legislatures in determining what should be considered a legitimate public purpose, applying only minimal scrutiny. Especially since the Supreme Court's ruling in *Kelo*, there has been public criticism of takings for economic development, leading many states to attempt to regulate or prohibit them. However, the need for land reform in Appalachia provides an example of a potential application of eminent domain for transfer to private owners that would serve a public purpose.

In conclusion, legislatures should not impose categorical bans on economic development takings. The Supreme Court even asserted that there is little basis for

distinguishing condemnation for economic development from other public purposes. To assure that municipal governments are not abusing their power of eminent domain, the courts should apply heightened scrutiny to suspect takings, based on a reclassification of property based on its political and social significance. Such scrutiny would permit the use of eminent domain for land reform in West Virginia, where redistribution of concentrated ownership would empower local residents to have more autonomy and political engagement and would therefore advance community cohesion. The West Virginia legislature should consider the potential "public purpose" to be achieved by redistributing land from corporations to the state's residents.

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